

1 MICHAEL S. SORGEN (SBN 43107)
2 msorgen@sorgen.net
3 JOSHUA N. SONDEHEIMER (SBN 152000)
4 jsondheimer@sorgen.net
5 LAW OFFICES OF MICHAEL S. SORGEN
6 240 Stockton Street, 9th Floor
7 San Francisco, California 94108
8 Tel: (415) 956-1360
9 Fax: (415) 956-6342

10 Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JENNIFER SAMSON DAVID,
Plaintiff,

vs.
CITY OF FREMONT, a municipal corporation; CRAIG STECKLER, individually and in his capacity as Chief of Police for the City of Fremont; OFFICER MICHAEL CHINN, individually; DOES 1-10, inclusive,

Defendants.

CONSOLIDATED
Case No. C 05-00046 CW

PLAINTIFF JENNIFER SAMSON DAVID'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Per Court's Order, hearing to be held only upon Court's request

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1 **I. INTRODUCTION**

2 Glenn David, recently remarried and father of two children, was needlessly shot and killed
 3 on February 18, 2004, by Fremont police officer Michael Chinn. In responding to the call to
 4 come to David's assistance, Officer Chinn disregarded orders to wait for the arrival of a sergeant
 5 carrying a less-than-lethal weapon, and to "wait until we get ourselves set up" before seeking to
 6 engage David. Instead he rushed alone to confront David. Chinn's rash and deliberate action led
 7 inexorably to his brief and fatal interaction with David. Officer Chinn's response violated his
 8 direct orders and Fremont Police Department guidelines for police response tactics. His actions
 9 were directly contrary to all well-established principles for interacting with suicidal and
 10 emotionally disturbed individuals. In light of the totality of circumstances, there is abundant
 11 evidence from which the trier of fact may conclude that Officer Chinn's shooting of David was
 12 objectively unreasonable. Chinn's grossly reckless behavior, and the failures of command and
 13 control that permitted it, followed from an unofficial custom or policy within the Fremont Police
 14 Department of deliberate indifference to the rights of such persons. This custom or policy are
 15 demonstrated by the Department's failure to address the high incidence of shootings by its
 16 officers, particularly of emotionally disturbed or suicidal persons, its approval and ratification of
 17 Officer Chinn's actions, and its failure to properly train its officers to handle calls concerning
 18 suicidal and emotionally disturbed individuals. For these reasons, as fully set forth below,
 19 defendants' motion must be denied.¹

20 **II. STATEMENT OF FACTS**

21 On February 18, 2004, decedent Glenn David was working into the evening at his
 22 workplace, GarrettCom, an electronics firm located in Fremont, California. For reasons that
 23 remain unclear, at or about 8:00 p.m., David became distraught and cut himself in the abdomen
 24 with a knife, claiming that he was committing suicide. An employee called 911 to ask for
 25 emergency assistance for David, and all other employees were evacuated from the building.
 26 Employees left the building and stood outside in the parking lot, waiting for the arrival of medical

27 ¹ Plaintiff also joins in the Opposition by plaintiffs M.D. and Rachel David to Defendants' Motion for
 28 Summary Judgment.

1 personnel and the police. David remained inside the GarrettCom building.

After receiving the 911 call, a Fremont Police Department ("Department") police dispatcher alerted officers to respond to a suicidal individual carrying a knife in the GarrettCom building. The dispatcher alerted officers that "all other employees are outside." (Chinn Dep. 67:20-68:9).²

Officer Chinn was one of the officers who responded to the call. Chinn had been hired as a Fremont Police Officer in 2001, and had previously served as an officer with the City of Alameda, serving as a member of its Special Weapons and Tactics ("SWAT") team. (*Id.* at 10:25-11:3). Chinn had applied to serve as a member of the Fremont Police Department's SWAT team in or about 2003, but was not accepted. (*Id.* at 22:16-24).

11 Officer Chinn's patrol supervisor issued instructions to officers over police radio Channel 1
12 as responding officers drove towards the GarrettCom building. The last of the instructions
13 specifically related to how the officers should set up upon reaching the GarrettCom building.
14 Officers were instructed: "**Let's just contain him for now until we get ourselves set up.**"
15 Shortly after, the officers were instructed: "**Apparently he's inside the building. Let's set up a**
16 **perimeter and wait for "less-than-lethal," then we'll go in.**" (Ex. 1 Fremont Police Radio
17 Channel 1 (CD Track 2) at 8:45 and 9:15)³. Officer Chinn disregarded these instructions, with
18 tragic results.

19 Dispatch continued to advise officers of developments as the officers approached the
20 GarrettCom facility. Officer Chinn heard that an officer with a "pepperball gun" -- a non-lethal
21 device that shoots small plastic balls filled with pepper spray - was on its way, and understood
22 that a trained hostage negotiator had also been dispatched to the scene. (*Id.* at 145:8 - 146:1).
23 Chinn learned over the radio while en route that David had cut himself on the wrists and stabbed
24 himself in the stomach. (*Id.* at 74:2-6). **Officers also were advised that David had not**

² All deposition transcripts referenced herein are attached as Exhibits to the accompanying Declaration of Joshua Sondheimer, in alphabetical order by the deponent's name.

³ All references to Exhibits are to the Sondheimer Declaration, unless otherwise noted.

1 **threatened anyone.** (Ex. 2 at 0210; Malcomson Dep. 81:5 - 82:3).

2 Officer William Malcomson was the first officer to arrive at the scene. (Chinn Dep.
 3 76:15-20). Malcomson pulled into a driveway on the east side of the GarrettCom facility and
 4 began to speak with two employees who approached him. Malcomson was told that David was
 5 inside the building and that all the employees were outside, and communicated this information
 6 over his police radio. (Malcomson Dep. 69:19-71:6; 73:10-13).

7 As Chinn arrived at the scene, he drove up behind Malcomson's car and saw him speaking
 8 with the GarrettCom employees. (Chinn Dep. 85:6-20). After speaking briefly with the
 9 employees, Malcomson got back into his vehicle and began driving up the east side of the
 10 GarrettCom building towards the rear where David was believed to be. (Malcomson Dep. 72:10-
 11 73:10). Chinn initially followed Malcomson in his vehicle towards the rear of the building.
 12 (Chinn Dep. 89:24 - 90:11).

13 Malcomson stopped before reaching the back wall of the facility for "officer safety"
 14 reasons, and began to exit his car. He expected that Chinn would stop behind him, and intended
 15 to discuss the situation with Chinn. (Malcomson Dep. 80:4 -13; 138:1-139:1). Under
 16 Department "Protocol for Managing Critical Incidents," under which Officer Chinn and all
 17 Fremont officers ostensibly were trained, the fact that Officer Malcomson arrived first on the
 18 scene made him the temporary "incident commander," at least until a supervising officer arrived
 19 and took control of the response. (Ex. 3, at 2). Under these guidelines, the first officer on scene
 20 "is in control of the scene until relieved by a supervisor," and is responsible for collecting available
 21 information and directing and coordinating the response of officers at the scene. (*Id.* at 2).
 22 Specifically:

23 The first officer on scene has the authority and the responsibility to control and dictate the
 24 response of additional responding units. This includes setting of perimeters, initial
 25 assignment upon arrival, establishing staging locations, and other tactical/strategic needs.
 26 [*Id.* at 3]

27 However, even as late as his deposition, Chinn remained unaware of any protocol as to
 28 who is in charge among officers responding to an incident, asserting that: "There is no specific
 29 thing that says, you know, one particular officer is 'in charge' or not, unless, you know, an officer

1 assumes that position." (Chinn Dep. 77:15-78:2).

2 Contrary to Malcomson's expectations, Chinn did not stop behind him, but instead passed
 3 him and drove directly to the rear of the building. Chinn did not communicate his intentions in
 4 any way with Malcomson. (Chinn Dep. 89:25-91:20; Malcomson Dep. 80:4-13; 85:21-86:4;
 5 87:3-8). Malcomson hurried back into his car and followed Chinn around to the rear of the
 6 building, parking behind Officer Chinn's vehicle. (*Id.*; Malcomson Dep. 83:13-84:4). Malcomson
 7 was concerned that he needed to cover Chinn, although he expected that Chinn, having arrived
 8 after Malcomson, would cover him. (*Id.* at 84:25-85:6; 85:21-86:4). Malcomson was
 9 "surprised" by Chinn's actions (Ex. 11 at 0485) but parked his car and moved "very quickly" to
 10 follow Chinn to the open back door, and arrived there just a few seconds after Chinn. (*Id.* at
 11 87:18 - 88:1).

12 Malcomson had intended to try to talk to other employees who had congregated at the
 13 back of the building to gather further information for developing a response plan, and to discuss
 14 the situation with Chinn. However, Officer Chinn's actions forced Malcomson to abandon those
 15 plans. (Malcomson Dep. 111:22-112:15; 118:10-22; 138:1-139:1).

16 According to Chinn, as he stopped at the back of the building, he saw three employees
 17 walking away from the building, and asked them if David was still inside. Although Chinn
 18 professes to have been concerned about whether other employees were inside the building, he did
 19 not ask about that. (*Id.* at 88:15-23; 97:1-5).

20 Just before Chinn's arrival, GarrettCom employee Lance Deutscher had gone inside the
 21 building and attempted to speak with David, who was noncommunicative. Officer Chinn arrived
 22 at the back of the building and shined his spotlight on the open door just as Deutscher stepped
 23 outside of the building. ((Deutscher Dep. 49:20-24; 53:8-17). However, Chinn made no effort to
 24 communicate or gather information from him. (*Id.* at 61:11-13). Had Chinn done so he would
 25 have about David's nonthreatening, noncommunicative state and that no one else was in the
 26 building. (Deutscher Dep. 64:11-67:11).

27 Chinn turned his spotlight on the open back door and approached to the threshold of the
 28

1 door. (Chinn Dep. 109:4-11). At this point in time, Chinn had **no information about David**
 2 **having made any threat towards anyone else.** (*Id.* at 110:7-14). Chinn immediately saw
 3 David, standing on the other end of the manufacturing facility, a distance Chinn estimated at
 4 roughly 80 feet away. Chinn took out his service revolver at this time and pointed it at David.
 5 (*Id.* at 113:4-9; 116:22-117:20).

6 When Chinn looked inside the Garrettcom building, he saw that David was holding a knife
 7 and bleeding from his abdomen and wrists. (Chinn Dep. 142:4-13). Although Chinn understood
 8 that a negotiator was on the way, and officers had been advised of that over the police radio, Chinn
 9 sought to engage David, once asking him his name, and then began repeatedly commanding David
 10 to drop the knife. (*Id.* at 120:23-121:8). Chinn was standing exposed in the middle of the open
 11 doorway. (*Id.* at 125:4-8). David was agitated and yelled to the officers, "Shoot me." Chinn
 12 could not understand anything else David said. (*Id.* at 120:23 - 121:16).

13 Officer Malcomson radioed requests that "less than lethal" force be hurried to the scene.
 14 According to Officers Chinn and Malcomson, David variously advanced towards and retreated
 15 away from the officers. (*Id.* at 120:10-22; Malcomson Dep. 143:22-144:11). At one point, as
 16 David allegedly was advancing, Officer Chinn fired two shots from his pistol. One of the shots hit
 17 David who soon collapsed to the ground. (Chinn Dep. 153:1-16). Although Malcomson was
 18 providing cover for Chinn, he maintained his revolver at the "low ready" position throughout the
 19 incident and did not shoot at David. (Malcomson Dep. 94:1-3).

20 David was subdued by officers and eventually transported by ambulance to San Jose
 21 Medical Center. David was given emergency surgery but died in the operating room. The county
 22 coroner's office identified the cause of David's death as "gunshot wound of the abdomen." (Ex. 4
 23 at 000013).

24 **III. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER OFFICER**
CHINN'S INITIAL RESPONSE AND USE OF FORCE WERE OBJECTIVELY
UNREASONABLE AND VIOLATED GLENN DAVID'S FOURTH AMENDMENT
RIGHTS

25 To determine whether a police officer's actions violated the Fourth Amendment's
 26 prohibition on unreasonable searches and seizures, the Court must examine whether the officer's
 27
 28

1 conduct was “objectively reasonable.” *Graham v. O’Connor*, 490 U.S. 386, 397 (1989).

2 **A. Officer Chinn’s Response Went Beyond Mere “Bad Tactics” and**
 3 **Unreasonably Provoked the Confrontation with David**

4 Addressing situations in which an officers’ conduct “provokes a violent response,” the
 5 Ninth Circuit held in *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002), that “if an officer’s
 6 provocative actions are objectively unreasonable under the Fourth Amendment . . . , *liability is*
 7 *established*, and the question becomes the scope of liability.” (Emphasis added). An abundance of
 8 evidence would support the trier of fact in concluding that Officer Chinn unreasonably provoked
 9 the tragic and fatal confrontation with Glenn David.

10 Officer Chinn's aberrant and irresponsible handling of the situation went beyond the bounds
 11 of negligence and was “objectively unreasonable.” Acting as a “lone cowboy”—possibly seeking to
 12 demonstrate his credentials for the SWAT team position he was denied on his first application—
 13 Officer Chinn recklessly precipitated a confrontation with Glenn David. Moments before Chinn
 14 confronted David, pointed his gun at him and started issuing commands, David was then not in a
 15 highly agitated state: David’s workmate, Lance Deutscher, had gone back into the building and
 16 attempted to engage David in conversation. He left David just moments before Chinn arrived and
 17 had found David to be non-responsive and at times looking like he was going to faint. (Deutscher
 18 Dep. 42:2-11; 43:24-44:10; 47:3-9.) **It is undisputed that David had not threatened anyone**
 19 **prior to the incident, and information to that effect was reported over the police radio prior**
 20 **to Officer Chinn’s arrival.**

21 Chinn violated his own commander's orders and all precepts of well-established police
 22 practices for approaching and engaging disturbed or suicidal individuals. (Ex. 5at 11-19). Chinn
 23 violated his own supervisor's orders to "set up" at the scene and wait for less than lethal force.
 24 Instead, he rushed past Officer Malcomson without communicating in any way with Malcomson in
 25 order to coordinate a response. These actions violated Chinn's own training with respect to
 26 Critical Incident Response, which required that he serve as a cover officer for Malcomson by virtue
 27 of Malcomson's having arrived at the scene, and to coordinate with and receive direction from
 28 Malcomson. Officer Chinn also failed to gather any information from employees other than

1 David's location, and rushed to engage David alone, without cover, and without waiting for the
 2 less than lethal force and a trained negotiator he knew were en route to the scene.

3 Guidelines and accepted practices for police officers approaching and engaging persons
 4 who are emotionally disturbed or suicidal are well established. See, e.g., *Buchanan v. City of*
 5 *Milwaukee*, 290 F.Supp.2d 954, 960-61 (E.D. Wis. 2003) ("A great deal of information has long
 6 been available to police officers concerning how to interact with persons who are emotionally
 7 disturbed."). These guidelines are reflected in a one-time training on "Suicide in Progress/Suicide
 8 by Cop" provided by the Department to officers in 1999. (Ex. 6). Guidelines included in the
 9 training, and the ways in which Chinn failed so completely to follow them, are identified below:

10 **GUIDELINES (Verbatim)**
 11 (Ex. 6 at 1257, 1269-76):

12 SIMPLY STATED, STOP, LOOK, AND
 13 LISTEN

14 DON'T RUSH THE SITUATION

15 DON'T PRECIPITATE THE
 16 CONFLICT...DON'T BECOME A TARGET

17 MAINTAIN COVER

18 NO HEROIC ACTIONS

19
 20 MAINTAIN DISCIPLINE FOR A
 21 CONTROLLED CONTACT WITH THE
 22 SUBJECT

23 DO NOT PROVOKE THE SITUATION. . .

24
 25 **Additional "Do's" and "Don'ts" Identified
 26 in the Training not reflected above Include:**

27 ESTABLISH INCIDENT COMMANDER

10 **OFFICER CHINN'S ACTIONS**

11 Failed to gather information from witnesses,
 12 and rushed to engage David after already
 13 learning that David was inside building

14 Rushed to engage David

15 Immediately drew and aimed weapon at
 16 David while David approximately 80 feet
 17 away, and began issuing repeated commands;
 18 stood in exposed position in doorway
 19 without cover

20 Stood in exposed doorway without cover

21 Rushed past Malcomson to engage David
 22 alone, without communicating plans or
 23 intentions

24 Failed to follow established guidelines for
 25 coordinated response to critical incident

26 Immediately drew and aimed weapon at
 27 David while David approximately 80 feet
 28 away, and began issuing repeated commands

29
 30 Failed to communicate or coordinate with
 31 Malcomson, incident commander under
 32 Department policies

1	CONTAIN AND EVACUATE	Failed to wait until perimeter established before approach (see below)
2	DEVELOP A 2-COMPONENT PLAN: VERBAL (MENTAL) INTERVENTION, TACTICAL INTERVENTION (IF POSSIBLE)	Failed to wait until plan established
3	COLLECT ALL AVAILABLE INFORMATION ABOUT PATIENT BEFORE APPROACH...NO NEED TO RUSH	Failed to communicate with Malcomson or witnesses before approach
4	FULLY DISCUSS AND REVIEW ALL ASPECTS OF THE PLAN	Failed to wait for a plan
5	IF/WHEN APPROACH IS APPROPRIATE, ALWAYS IN PAIRS	Approached David alone
6	DON'T DEMAND CONTROL FROM THE PATIENT . . TRUST AND SURRENDER TAKES TIME	Immediately began demanding control from David
7	"Techniques" Identified Include:	
8	STAY TOGETHER	Acted alone
9	CALL SUSPECT OUT OF HOUSE OR HAVE DESK CALL BACK TO LOCATION AND HAVE SUSPECT STEP OUT	Sought to engage David inside GarrettCom building
10	AVOID ENTERING HOME	Sought to engage David inside GarrettCom building

Officer Chinn's actions, so directly contrary to basic police practices, recklessly provoked the confrontation with an obviously emotionally disturbed and suicidal individual, and left deadly force as the only option. Under the circumstances, Officer Chinn's provocation of the violent incident was objectively *unreasonable*, and Officer Chinn's liability for the resulting shooting of David "is established." *Billington*, 292 F.3d at 1190. A reasonable officer would have anticipated that an emotionally disturbed individual such as David would be non-compliant with commands: The City's training on handling emotionally disturbed individuals anticipates a likelihood that a suicidal subject will be noncompliant with commands and try to create a confrontation. (Nelson Dep. 168:19-169:20; 178:22-179:5; Clark Report, Ex. 5, at 11-14). Officer Chinn failed to follow recommended procedures specifically designed to minimize the likelihood of using force in any such confrontation. Thus, there is sufficient evidence for a jury to conclude that Officer Chinn's reckless and objectively unreasonable conduct were a proximate cause of his death.

1 Where an officer "intentionally or recklessly provokes a violent response, the provocation
 2 is an independent constitutional violation. That provocation may also render the officer's
 3 otherwise "defensive" use of force unreasonable as a matter of law. *Billington*, 292 F.3d at
 4 1190-91. Officer Chinn pointed his loaded pistol at David, who was obviously emotionally
 5 distraught and who Chinn knew was suicidal and had not threatened anyone else. These actions
 6 are sufficient to constitute an independent Fourth Amendment violation. *See Robinson v. Solano*
 7 *County*, 278 F.3d 1007, 1013-14 (9th Cir. 2002) (officer's drawing weapon on suspect who had
 8 shot two dogs but did not pose threat to others at time and was not resisting arrest violated Fourth
 9 amendment); *Alexander v. City and County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994). In
 10 *Alexander*, officers forcibly entered the home of Henry Quade, who was mentally ill and had
 11 refused entry to health inspectors. Quade had declared he would shoot anyone who tried to enter
 12 his home. *Id.* at 1357-58. The officers shot Quade as he attempted to shoot at them. *Id.* at 1358.
 13 The Ninth Circuit held that if police used unreasonable force in entering home, they may be liable
 14 for using excessive force even if they reasonably shot Quade at the moment of the shooting. *Id.* at
 15 1366-67.

16 Similarly, ample evidence exists for the trier of fact to conclude that Officer Chinn's
 17 conduct led to his violent confrontation with David. Thus, Officer Chinn may be liable regardless
 18 of whether it finds that Officer Chinn's use of deadly force was defensive at the moment of the
 19 shooting.

20 **B. Officer Chinn's Use of Force Was Objectively Unreasonable**

21 The reasonableness of the force used to effect a particular seizure is determined by
 22 "careful[ly] balancing . . . 'the nature and quality of the intrusion on the individual's Fourth
 23 Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490
 24 U.S. at 396 (internal quotation omitted). Officer Chinn shot David, and the result was fatal. A
 25 seizure by deadly force is subject to the Fourth Amendment and its intrusiveness is "unmatched."
 26 *Tennessee v. Garner*, 471 U.S. 1, 7, 9 (1985).

27 On the other hand, the government interests at stake are weak. To evaluate the
 28

1 government interests involved in an officer's use of force, the Court must look to factors that
 2 include: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to
 3 the safety of the officers or others, (3) whether the suspect was actively resisting arrest or
 4 attempting to evade arrest by flight; and (4) any other exigent circumstances existing at the time.
 5 *Deorle v. Rutherford*, 272 F.3d at 2180 (9th Cir. 2001).

6 The Ninth Circuit has made clear that in weighing the competing interests of the victim and
 7 government, "where it is or should be apparent to the officers that the individual involved is
 8 emotionally disturbed, that is a factor that must be considered in determining . . . the
 9 reasonableness of the force employed." *Id.* at 1283. As the Court noted:

10 Even when an emotionally disturbed individual is "acting out" and inviting officers
 11 to use deadly force to subdue him, the government interest in using such force is
 12 diminished by the fact that the officers are confronted, not with a person who has
 13 committed a serious crime against others, but with a mentally ill individual.
 14 *Id.* A number of other courts have held to the same effect. *See, e.g., Buchanan*, 290 F.Supp.2d at
 15 960-61 (relevant factor in determining reasonableness of force is whether officer "knew or should
 16 have known that plaintiff was mentally ill and, if so, whether he followed generally accepted police
 17 practices applicable to encounters with such persons); *Palmquist v. Selvik*, 111 F.3d 1332, 1340-
 18 41 (7th Cir. 1997) (indicating that an officer's awareness of an emotionally disturbed person's
 19 suicidal motivation might have a bearing on what tactics and level of force are reasonable); *Ludwig*
 20 *v. Anderson*, 54 F.3d 465, 472 (8th Cir.1995) (stating that mental state of an emotionally disturbed
 21 person is relevant in assessing the reasonableness of an officer's use of deadly force).

22 Here, it was apparent before and upon Officer Chinn's arrival that David was emotionally
 23 disturbed. **Glenn David had committed no crime, was not a criminal suspect, and was not**
 24 **being sought for arrest. The officers had been advised repeatedly that David had not**
 25 **threatened anyone other than himself.** When Officer Chinn first observed David, he was by
 26 Chinn's estimate some 80-90 feet away and did not pose an immediate threat to Chinn's safety.
 27 Even as David approached, he never held the knife over his head in a throwing position and never
 28 ran towards the officers. (Chinn Dep. 150:4-7). David was not resisting arrest or attempting to
 flee.

1 There were no exigent circumstances that warranted Officer Chinn's haste to locate David.
 2 He had repeatedly just been advised that David was inside the building, and had been ordered to
 3 wait for less than lethal force to arrive before attempting to encounter David. Indeed, Chinn had
 4 been specifically instructed to just contain David until the officers could get themselves set up, and
 5 to await for less than lethal force before approaching David. Considering all the circumstances and
 6 options available to Officer Chinn, any threat posed by David to the officers could readily have
 7 been avoided. (Clark Report, Ex. 5, at 15-17 ("all Officer Chin had to do to avoid a confrontation
 8 was to withdraw, shut the door and maintain containment as ordered")). Officer Chinn's
 9 knowledge that less than lethal force and a trained negotiator were en route to the scene – called
 10 for patience and efforts by the officers to avoid consummating David's irrational request for
 11 Officer Chinn to shoot him. "When the person seized is not a 'suspect,' has committed no crime
 12 when the police approach, and is provoked by police escalation of the situation, the 'importance of
 13 the governmental interests alleged to justify the intrusion' is necessarily diminished." *Ludwig*,
 14 *supra*, 54 F.3d at 471.

15 At least, a genuine issue exists as whether the force used by Officer Chinn was
 16 unreasonable. See *Deorle*, 272 F.3d at 1284-85 (even less than lethal force used against
 17 emotionally disturbed individual who had not threatened others, and where team of negotiators
 18 was en route, violated individual's Fourth Amendment rights); *Herrera v. Las Vegas Metropolitan*
 19 *Police Dept.*, 298 F.Supp.2d 1043, 1051 (D. Nev. 2004) (use of deadly force against obviously
 20 emotional and disturbed individual unreasonable given that officers took "confrontive approach"
 21 and did not retreat when it became clear that victim was becoming more agitated).

22 In *Herrera*, as here, officers shot and killed an emotionally disturbed man who refused to
 23 yield to their instructions to drop a paring knife and who, according to the officers, moved towards
 24 them from within 10-15 feet, posing a "serious threat" to their safety. 298 F.Supp.2d at 1047-48,
 25 1050. The court denied summary judgment. The court noted that the decedent Herrera was "not
 26 approached by police due to any criminal activity." *Id.* at 1051. Similarly to David, Herrera's
 27 resistance was "due entirely to his delusional state rather than any reasoned recalcitrance on his
 28

1 part.” *Id.* Herrera was in his family home and no one else was inside, leading the court to
 2 conclude there was “no evidence of exigent circumstances warranting the haste with which the
 3 Metro officers pursued this situation.” *Id.* The Court concluded:

4 At the time of his interaction with the police, Herrera was in a severely emotional
 5 mental state. This was clear to the officers not only from the information they
 6 received upon their arrival, but also during the course of their interaction with
 7 Herrera. Yet, the officers took a confrontive approach with Herrera and did not
 8 retreat or reconsider that approach, even when it was clear that Herrera was
 becoming more agitated. In light of the disputed facts, and the fact that this
 confrontation resulted in the death of an individual whom Metro officers were
 aware was mentally incompetent, this Court cannot rule out liability on the part of
 [the officers] for any improper action or supervision during the confrontation.

9 *Id.*

10 **C. Officer Chinn is Not Entitled to Qualified Immunity**

11 In determining whether qualified immunity applies, the Court must determine whether it
 12 would be “clear to a reasonable officer that his conduct was unlawful in the situation he
 13 confronted.” *Deorle*, 272 F.2d at 1285 (quoting *Saucier v. Katz*, [533 U.S. 194], 121 S.Ct. 2151,
 14 2156 (2001)).

15 Plaintiffs have demonstrated “clear authority” that prohibited Officer Chinn from
 16 responding in the manner he did and shooting Glenn David under the specific circumstances
 17 presented by the incident. Moreover, the Supreme Court has rejected the notion that officer
 18 liability cannot exist “unless the very action in question has previously been held unlawful.”
 19 *Anderson v. Creighton*, 483 U.S. 645, 640 (1987) (qualified immunity not warranted if, in light of
 20 pre-existing law, the unlawfulness of the officer’s actions is apparent.)

21 An officer will be entitled to qualified immunity only if he made a “reasonable mistake[] as
 22 to the legality of [his] actions.” *Deorle*, 272 F.3d at 1285. In *Deorle*, police were called by
 23 Deorle’s wife, who reported that he had become suicidal, and had “lost control of himself.” *Id.* at
 24 1275-76. At least 13 officers responded to the scene, set up roadblocks and awaited the arrival of
 25 a Special Incident Response Team and a team of trained negotiators. *Id.* at 1276. At one point,
 26 Deorle shouted “kill me” and brandished a hatchet at an officer. *Id.* One of the officers,
 27 Rutherford, moved closer to Deorle, and observed him carrying an unloaded crossbow in one

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1 hand, and what may have been a can or a bottle of lighter fluid. *Id.* at 1277. Deorle threatened to
 2 “kick [Rutherford’s ass],” but put down the crossbow at Rutherford’s request. *Id.* At one point,
 3 Deorle began to approach Rutherford at a steady gait, still holding the bottle or can. When he
 4 reached a certain point, Rutherford shot Deorle with a lead-filled “beanbag round.” *Id.* at 1278.
 5 The shot hit Deorle in the face, removing one of his eyes and causing skull fractures. The Ninth
 6 Circuit reversed summary judgment, finding that Rutherford was not entitled to qualified immunity
 7 for his use of less than lethal force against Deorle. The Court held that: “It should have been clear
 8 to any reasonable officer that, under the circumstances present, firing at Deorle was objectively
 9 unreasonable.” *Id.* at 1285. Supporting its holding, the Court noted that Deorle had committed no
 10 offense, was emotionally disturbed, and did not pose an objectively reasonable threat to the safety
 11 of the officer or other individuals. The Court also found it pertinent that “a team of negotiators
 12 essential to resolving such situations was en route.” *Id.*

13 Here too, Officer Chinn used deadly force against an obviously emotionally disturbed
 14 person and the officer’s own actions provoked the confrontation. It would have been apparent to
 15 a reasonable officers that using deadly force against David was unlawful. See *Deorle*, 272 F.3d at
 16 1285-86. Officer Chinn’s alleged belief that he needed to shoot David to protect his safety was not
 17 objectively reasonable. His duty was to make a tactical retreat and use deadly force only with the
 18 utmost care and restraint. (Clark Report, Ex. 5, at 15-16). As plaintiffs’ expert Roger Clark
 19 observes, Officer Chinn “demanded (and expected) that Mr. David act rationally. This is clearly
 20 contrary to the basic tactics required in dealing with impaired and possibly mentally ill individuals.”
 21 (*Id.* at 14). Officer Chinn did not make a “reasonable mistake” as to the legality of his actions.
 22 *Deorle*, 272 F.3d at 1285. Rather, he placed responsibility for the outcome of the confrontation
 23 solely on David despite knowing that the victim was not acting rationally. As Officer Chinn stated:

24 4 Q. Okay. So there is nothing, in your

25 5 opinion, that you could have done to avoid killing

26 6 Glenn David.

27 7 A. Maybe if I had asked him one more time to

1 8 drop the knife, and he did it, then, yeah, that would
2 9 have precipitated me from shooting him.

3 10 Q. **So it was all up to him.**

4 11 A. **That's correct.**

5 12 Q. But if he was suicidal, and wanted your
6 13 help in consummating the suicide, then, he was going to
7 14 get it, right?

8 15 A. Yes.

9 (Chinn Dep. 199:4-15).

10 The unlawfulness of Officer Chinn's shooting of David was apparent. Chinn is not entitled
11 to qualified immunity.

12 **IV. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER THE CITY
13 AND CHIEF STECKLER MAY BE HELD LIABLE FOR CONDONING
14 UNREASONABLE FORCE AGAINST EMOTIONALLY DISTURBED PERSONS,
FOR RATIFYING OFFICER CHINN'S CONDUCT, AND FOR FAILING TO
ADEQUATELY TRAIN FREMONT POLICE OFFICERS**

15 Genuine issues of material fact exist as to whether the shooting of David resulted from the
16 City's custom of acquiescing in unreasonable use of force by Fremont police officers, the City's
17 deliberate indifference to the rights of emotionally disturbed persons with whom its officers come
18 into contact, and the ratification by police officials of Officer Chinn's violation of David's
19 constitutional rights. A public entity is liable when it commits or condones constitutional
20 violations pursuant to the entity's policy or custom, *Monell v. Department of Social Services*, 436
21 U.S. 658, 690-92 (1978), or due to inadequate training, supervision, or discipline rising to the level
22 of deliberate indifference. *See City of Canton v. Harris*, 489 U.S. 378, 390 (1989).

23

24 **A. Unofficial Custom or Policy of Deliberate Indifference**

25 Here, the City of Fremont demonstrated its custom of acquiescing in or condoning
26 unconstitutional conduct by failing to take any special action to investigate or provide
27 supplemental training in response to a high number of officer-involved shootings – largely of

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1 mentally disturbed individuals -- and by ratifying Officer Chinn's unreasonable and unnecessary
 2 shooting of Glenn David.

3 Since 1992, Fremont police officers have been involved in at least twelve officer-involved
 4 shootings, at least half of which involved emotionally disturbed individuals. (Ex. 7). In nine of the
 5 incidents, the suspects died or were injured by the police; in two the suspects died of self-inflicted
 6 injury. Following the shooting of Glenn David, Fremont officers were involved in at least two
 7 additional shootings, one resulting in the subject's death, the other wounding the subject. Five
 8 incidents, including the killing of Glenn David, occurred within the span of just two years. (*Id.*).

9 An incident in 1993 is the subject of a reported California decision, *Adams v. City of*
 10 *Fremont*, 68 Cal.App.4th 243 (1998). Fremont police officers shot Patrick Adams, who had been
 11 threatening suicide with a firearm. Officers had been called to Adams' home after his wife called
 12 911 concerned that he might have shot himself. Officers located Adams in the backyard of his
 13 home, armed with a handgun which he kept pointed to his chest. Various officers attempted to
 14 negotiate with Adams and get him to throw out the gun. At one point, officers surrounding the
 15 scene heard a gunshot and fired at Adams, apparently believing he had fired at them. Adams
 16 suffered numerous bullet wounds, one of which apparently was from his own weapon, and his
 17 death was attributed primarily to the self-inflicted wound. *Id.*, 68 Cal.App.4th at 249-55.

18 The jury heard testimony from numerous officers at the scene and from expert witnesses on
 19 police practices. *Id.* The jury determined that the responding officers negligently caused Adams'
 20 death, and issued a \$4 million verdict against defendants. In support of its verdict of negligence,
 21 the jury issued special findings of fact which chillingly resemble the officers' and Department's
 22 failures here. The jury's findings included:

- 23 (1) "Lacked control of the officers";
- 24 (2) "Insufficient communications";
- 25 (3) "Lack of information";
- 26 (4) "Did not respond to suicide call as such. It was an assault response rather than
 assist";
- 27 (5) "Did not follow Fremont Police Dep[artment] procedures for dealing with a
 critical incident"; . . .
- 28 (8) "Allowed untrained officer to attempt negotiation"; . . .
- (11) "The use of [seven] armed officers left no option but force";
- (12) "Once location of [Adams] was known, did not back down to allow calming of

1 situation"; and

2 *Id.*, 68 Cal.App.4th at 205.

3 The jury's striking findings necessarily put the Department on notice that it needed to take
 4 remedial measures to help avoid any recurrence of similar tragic incidents. However, the
 5 Department provided no focused training on handling emotionally disturbed or suicidal persons
 6 until six years after the incident. (Ex. 8 at 8-9 (Response to Interrogatory No. 8); see Lucero
 7 Dep. 49:24-50:3). Fremont police Captain Richard Lucero, a Department veteran since 1987 who
 8 played an "important" role in Department training since 1995, testified that he was unaware of any
 9 discipline against Fremont officers in connection with the Adams incident. (Lucero Dep. 15:13-15,
 10 58:16-21, 150:13-151:2). The City did, however, contest the verdict. On appeal, the Court of
 11 Appeal reversed the judgment against the officers on the sole ground that the officers "owed no
 12 duty of care" to take reasonable steps to prevent Adams from committing suicide. *Adams*, 68
 13 Cal.App.4th at 264-89.

14 Indeed, the Fremont Police Department has not disciplined *any* of its officers in connection
 15 with its officer-involved shootings (Lucero Dep. 150:19-151:15, 155:1-4). Captain Lucero is also
 16 unaware of any changes in policy that resulted from these incidents. (*Id.* at 152:16-25, 155:2-5).
 17 At least since 2002, the Department has never referred any of the shooting incidents to its Internal
 18 Affairs Division for investigative review. (Nelson Dep. 53:12-54:13). Captain Lucero testified
 19 that he was unaware of any discussions within the Department about the possible causes of the
 20 occurrence of five shooting incidents in the two years between September 2003 and 2005,
 21 including the killing of Glenn David, or of any discussion about the heightened frequency of
 22 incidents during this period as a "problem." (*Id.* at 65:3-17; 66:19-25). The Department's failure
 23 to identify any need for training reinforcement before or after this spate of incidents (*Id.* at 58:23-
 24 59:11) to avoid further civilian deaths falls below accepted professional standards, regardless of
 25 whether the shootings were "within policy," and demonstrate a departmental culture of disregard
 26 for the gravity of shootings of civilians by its police officers. (See Clark Report, Ex. 5, at 2, 16).

27 In 2002, the Department instituted a procedure for convening "Training Review Boards" to
 28

1 review certain types of incidents, including officer-involved shootings, "for training purposes."
 2 (Ex. 9, § 1). The policy provides that its purpose is to "lead to the improvement of our training
 3 programs," but not for the purpose of "administrative review leading to punitive action for the
 4 employee's actions." (*Id.* § 2). Indeed, if suspected violations of "law, rules, policies, or
 5 procedures" are discovered, the policy requires that the Review Board "immediately cease its
 6 inquiry" and refer the matter to the Department's internal affairs division for disciplinary
 7 investigation. (*Id.*). Since the creation of the review board policy, none of the four training review
 8 boards convened in response to police shootings, including the Department's review of Chinn's
 9 killing of Glenn David, have been suspended for referral to internal affairs. (Nelson Dep. 53:12-
 10 54:13, 57:7-13).

11 Command and control failures in the Department's response during the incident also
 12 demonstrate a Departmental culture of deliberate indifference. As plaintiffs' expert Roger Clark
 13 notes, it should have been apparent to Malcomson that he should intercede with Chinn to order
 14 Chinn to withdraw. (Ex. 5 at 11). Moreover, Watch Commander Sergeant Gott failed to ensure
 15 Chinn's compliance with the instruction to wait for less lethal force after containing David. The
 16 lack of clear and resolute direction to the officers also demonstrates an underlying policy of
 17 tolerance for unnecessary shootings of emotionally disturbed individuals, as happened here. (*Id.* at
 18 10, 16-17).

19 **B. Deliberate Indifference May Also Be Inferred from The Department's
 20 Commendation of Chinn's Conduct**

21 The response of policymakers to an incident "is not only admissible for purposes of proving
 22 a municipal defendant's policy or custom, but may be highly probative with respect to that inquiry."
 23 *Henry v. County of Shasta*, 132 F.3d 512 (9th Cir. 1997), amended, 137 F.3d 1372 (1998). When
 24 a municipal defendant "continues to turn a blind eye to severe violations of inmates' constitutional
 25 rights--despite having received notice of such violations--a rational fact finder may properly infer
 26 the existence of a previous policy or custom of deliberate indifference." *Id.*, 137 F.3d 1372. In
 27 *McRorie v. Shimoda*, 795 F.2d 780, 784 (9th Cir.1986), the Ninth Circuit specifically held that;

28 Policy or custom may be inferred if, after [the alleged violations], . . . officials took

1 no steps to reprimand or discharge the[ir subordinates], or if they otherwise failed
 2 to admit the [subordinates'] conduct was in error. [citation omitted]

3 See also *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir.1985) ("subsequent acceptance
 4 of dangerous recklessness by the policymaker tends to prove his preexisting disposition and
 5 policy").

6 Here, the Department's response and review of Chinn's killing of Glenn David and the
 7 Department's command and control response to the incident demonstrates the existence of a
 8 condoned custom of accepting dangerous recklessness on the part of its officers. Despite Officer
 9 Chinn's egregious disregard of the Department's policies, guidelines, and training in his response at
 10 the scene, responsible Department officials never discussed the possibility that Chinn's conduct
 11 warranted referral to internal affairs for discipline. (Lucero Dep. 82:13 - 83:1).

12 At Captain Lucero's request, the Department instead convened a Training Review Board,
 13 ostensibly to review the conduct of Officer Chinn and other officers for purposes of improving
 14 training. However, the outcome of the review was effectively predetermined, and the Board's
 15 report amounted to a "whitewash" of Chinn's and others' reckless response. In requesting that
 16 Fremont Police Captain Nelson convene a Training Review Board, Captain Lucero wrote to that
 17 Officer Chinn "made a necessary and appropriate decision to discharge his firearm." (Ex. 10).
 18 Yet, Captains Lucero and Nelson had already agreed that Chinn's conduct was "necessary and
 19 appropriate." (Nelson Depo. at 88:14-89:18).

20 The Review Board consisted of Captain Nelson, Sergeant Dauzat—coordinator of the
 21 Department's Training Unit, and three "subject matter experts." (Ex. 11). Their analysis was
 22 based on a review of the available documentation -- apparently the Department's own report -- and
 23 oral testimony of police officers involved. The report does identify some of the aspects of Office
 24 Chinn's reckless response: For example, the report:

- 25 1. Confirms that Officer Malcomson was surprised when Officer Chinn drove past him
 to get to the rear of the building;
- 26 2. States that Chinn never discussed with Malcomson, who was the incident
 commander by virtue of his being the first officer on the scene, that he intended to
 drive to the rear of the building and approach the rear doorway;
- 27

- 1 3. Notes that Chinn believed the situation warranted an immediate response because it
2 was was similar to an "active shooter" situation, but that "[b]ased upon information
3 received and broadcast to the officers on the scene, the incident had not risen to the
4 level of an active shooter tactical response";
5 4. Observes that it "may have been prudent" for an emergency response team,
6 optimally comprised of a sergeant and 3 to 5 officers, to approach the open
7 doorway and assess the situation after a perimeter had been established;
8 5. Notes that Chinn "approached the open rear door by himself and was unaware of
9 the locations of his fellow officers;"
10 6. Notes that by moving into the center of the rear doorway, Chinn "unnecessarily
11 expose[d] himself to engage David;"
12 7. Notes that Chinn "immediately began giving commands to David while he held him
13 at gunpoint."

10 (Ex. 11 at 0485).

11 Notwithstanding these observations of Officer Chinn's violations of Department training
12 and guidelines, the Board disregarded Chinn's failure to follow the instruction issued by radio to all
13 officers to "just contain him for now until we get ourselves set up," and to "set up a perimeter and
14 wait for less than lethal -- then we'll go in." (Ex. 1). The Review Board even concluded that the
15 officers did an "admirable job" in dealing with the situation, and that "all of the officers associated
16 with this incident acted in a professional manner and within departmental policy." (*Id.* at 0486-87).

17 Captain Nelson concluded that the response demonstrated "no obvious deficiencies that we
18 were concerned about that warranted any kind of special training." (Nelson Dep. 116:5-117:2).
19 The Board recommended no special training for Officer Chinn, and only "refresher training" with
20 respect to tactical response planning, team movement, and less lethal deployment. The report
21 concluded that the Department's regular ongoing training, such as a Critical Incident Response
22 Training offered in November 2003, would continue to prepare officers to confront similar
23 incidents. (Ex. 11 at 0486-87). The Board did not recommend further training, such as the 1999
24 training focused on handling emotionally disturbed and suicidal individuals, and never referred to
25 the Department's own training bulletin on "Suicide by Cop." (*Id.*).

26 The Department's conclusions and recommendations amount to a "whitewash" of the
27 obvious failings of Officer Chinn and the other officers and supervisors involved in this incident.
28

1 The failings were well below the applicable standards of care. (Clark Report, Ex. 5). Thus, the
 2 Department's commendation of the officers, and its failure to acknowledge the need for special
 3 training on handling situations regularly encountered by its officers that have repeatedly resulted in
 4 the loss of life, raise an inference sufficient to support the trier of fact in finding that the
 5 Department maintained a custom or policy of deliberate indifference.

6 **C. The Department's Ratification of Officer Chinn's Conduct Independently
 Subjects the City to Liability**

7 The Department's approval of Officer Chinn's objectively unreasonable use of deadly force
 8 against Glenn David independently raises a genuine issue of fact as to the City's liability. A
 9 municipality may be held liable when "authorized policymakers approve a subordinate's decision
 10 and the basis for it." *Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir. 1999), quoting *City of St.
 11 Louis v. Praprotnik*, 485 U.S. 112, 127 (1988)). Despite, the relevant officials must have
 12 knowledge of the alleged constitutional violation, they made a "conscious, affirmative choice" to
 13 approve it.

14 Under the Department's Training Review Board policy, the Board was duly delegated
 15 authority to make findings and conclusions following the incident. (Ex. 9). The Board's
 16 conclusions that Officer Chinn did an "admirable job" and that he "acted in a professional manner
 17 and within departmental policy" knowingly affirmed Officer Chinn's unconstitutional conduct and
 18 his asserted reasons for his conduct. The report as issued by the Board remains final,
 19 demonstrating Chief Steckler's acceptance of its conclusions and his ratification of Chinn's conduct
 20 as the City's primary police official. (Nelson Dep. 90:24-91:2)

22 **D. A Genuine Issue of Fact Exists as To Whether The Department's Inadequate
 Training Demonstrates Deliberate Indifference To Constitutional Rights**

24 A municipality may be held liable for failing to adequately train its police officers where the
 25 failure to train "amounts to deliberate indifference to the rights of persons with whom the police
 26 come into contact." *Canton* , 489 U.S. at 388. In evaluating a city's liability for inadequate
 27 training, "the focus must be on adequacy of the training program in relation to the tasks the
 28 particular officers must perform." *Canton*, 489 U.S. at 390. As one court noted, citing *Canton*,

1 "Deliberate indifference may be established by demonstrating a failure to train officers "in a specific
 2 area where there is an obvious need for training in order to avoid violations of citizens'
 3 constitutional rights." *Doggett v. Perez*, 348 F.Supp.2d 1179, 1193 (E.D. Wash. 2004).

4 Fremont police officers were called upon frequently to respond to situations involving
 5 emotionally disturbed individuals, including the mentally ill and individuals who have become
 6 suicidal. (See Dauzat Dep. 35:16-19; Malcomson Dep. 47:14-48:6; See also Clark Report, Ex. 5,
 7 at 12). Particularly in light of the commonality of such interactions, and their potential for violent
 8 confrontation, the Department was under a heightened duty to ensure that its officers were
 9 adequately trained to respond without leaving deadly force as the only option to subdue
 10 "threatening behavior" by such persons.

11 Here, a specific pattern of incidents involving the use of deadly force against emotionally
 12 disturbed individuals demonstrates the City's failings. Between 1992 and 1999, there were at least
 13 four separate incidents in which Fremont officers used deadly force against emotionally disturbed
 14 individuals. (Ex. 7). In 1999, the Department held two trainings dedicated to handling situations
 15 involving mentally ill and suicidal persons. The first of these, which focused on suicide
 16 intervention and the problem of "Suicide by Cop," was a six-hour course held on or about May 18,
 17 1999, and led by Dr. Barry Perrou, a psychologist and Sergeant with the Los Angeles Sheriff's
 18 Department. (Ex. 6) ("Perrou training"). The second, entitled "Police Handling of the Mentally
 19 Ill," was half-day course led by defense counsel in this matter, Gregory Fox, on or about December
 20 8, 1999. (Ex. 12).

21 The trainings provide important guidance and recommendations regarding handling
 22 mentally ill and suicidal persons. The Perrou training included background on suicide, and training
 23 on "crisis intervention and tactical response considerations," and "suicide by cop." As noted
 24 earlier, the training provided critical written guidance on tactical considerations for responding to
 25 and intervening with suicidal persons – virtually all of which Officer Chinn violated in his response
 26 to Glenn David. (Ex. 6). The Fox training similarly provided background on the "history of police
 27 handling of the mentally ill," "recognizing the mentally ill," "police response to the mentally ill,"
 28

1 the latter focusing on tactical considerations. Both trainings emphasized the importance of
 2 avoiding rushing the situation, making a controlled contact with the subject, not displaying arms
 3 or making demands, minimizing the possibilities for threats to be made against the officer (e.g.,
 4 maintaining cover), and recognizing that the subject is not likely to behave or respond rationally.
 5 (Exs. 6, 12). Unfortunately, Officer Chinn had not yet been hired with the Fremont Police
 6 Department at the time of these courses.

7 These special training courses had a beneficial effect initially. While Fremont police
 8 officers had been involved in six shootings prior to the 1999 trainings, including at least four
 9 involving emotionally disturbed or suicidal individuals, there were *no* officer-involved shooting
 10 incidents during a three-and-a-half year period following the 1999 trainings. The next shooting
 11 incident occurred in August 2002. (Ex. 7).

12 The Department failed, however, to ensure that the critical trainings on this issue were
 13 provided to newly-hired officers, or reinforced with existing officers. Neither of the courses, or
 14 related training regarding responding to mentally ill and suicidal individuals, was offered within the
 15 next six years. (Nelson Dep. 145:13-146:4; 91:18-92:17). Although a course on “Critical Incident
 16 Response” provided in November 2003 included some “table-top” and role-play exercises
 17 involving emotionally disturbed individuals, these trainings were not focused on and did not
 18 emphasize the special considerations involved in the Perrou and Fox trainings for handling
 19 emotionally disturbed and suicidal persons. (*Id.*, 145:13-146:4).

20 Based on the Perrou training, the Department issued a Training Bulletin to officers in July
 21 1999 on responding to Suicide by Cop situations. (Ex. 13). The training bulletin incorporated key
 22 points from the Perrou training, reflecting the Department’s view that it was a “good training.”
 23 (Lucero Dep. 126:5-10). However, the Bulletin did little more than collect dust after it was issued.
 24 (Dauzat Dep. 48:9-16; 51f:15-52:5). This despite the fact that Captain Lucero, who has played a
 25 key role in the Department’s training efforts, recognized training on mentally ill and suicidal
 26 individuals as a “critical topic.” (Lucero Dep. 132:2-17). Tellingly, the shooting of Glenn David
 27 was not discussed or reviewed in *any* training provided by the Department. (Lucero Dep. 91:18-
 28

1 93:2).

2 The Department's failure to follow through on training on the "critical topic" of handling
 3 mentally ill and suicidal individuals had dramatic results. While the 1999 trainings led to a three-
 4 and-a-half year period of *no* officer involved shootings, by 2002, shootings were again occurring.
 5 Between September 2003 and September 2005, Fremont officers fired at human beings at least five
 6 times, including Officer Chinn's shooting of Glenn David. As plaintiffs' expert Clark testifies,
 7 focused training to avoid situations leading to a resort to deadly force have and can be successful.
 8 (Clark Report, Ex. 5, at 4). The Department's failure to ensure that all its officers were properly
 9 trained on responses to emotionally disturbed persons and its impact on the numbers of shootings
 10 by Fremont officers, raise a genuine issue as to the Department's deliberate indifference to critical
 11 training needs. The trier of fact must have an opportunity to determine that the City's training
 12 failures were a moving force behind the violation. *Canton*, 489 U.S. at 389, 390.

13 As defendants acknowledge (Motion, at 15), the City may be held liable for its deliberate
 14 indifference to David's rights to life, liberty, and familial association regardless of whether the
 15 individual officers are found liable for excessive force. *See, e.g., Fairley v. Luman*, 281 F.3d 913
 16 (9th Cir. 2002) ("If a plaintiff establishes he suffered a constitutional injury by the City, the fact that
 17 individual officers are exonerated is immaterial to liability under § 1983."); *Chew v. Gates*, 27 F.3d
 18 1432, 1445 (9th Cir. 1994) (noting that a jury could conceivably find that an officer's actions were
 19 reasonable under the circumstances but the city was nevertheless at fault for its policies or
 20 practices).

21 **E. Genuine Issues Exist as to Chief Steckler's Liability**

22 Genuine issues of fact exist as to whether the Department, headed by Fremont Police Chief
 23 Steckler, maintained an unofficial custom or policy of deliberate indifference to constitutional
 24 violations by its officers. Therefore, there is no basis to grant summary judgment in favor of Chief
 25 Steckler. Proper individual defendants in a § 1983 action include "those officials who were in
 26 office before or at the time [plaintiff was killed] and who may have adopted a plan or policy
 27 authorizing the alleged unconstitutional violation." *Heller v. Bushey*, 759 F.2d 1371, 1375 (9th
 28

1 Cir. 1985), *rev'd and remanded on other grounds sub nom. City of Los Angeles v. Heller*, 475
2 U.S. 796 (1986). Chief Steckler was responsible, among other things, for the adequacy of the
3 Department's training policy. (Dauzat Dep. 32:17-20). It was "apparent" that the training
4 provided to Fremont Officers was inadequate and that Officer Chinn's unconstitutional conduct did
5 not warrant ratification. Therefore, Chief Steckler is not entitled to qualified immunity.

6 **V. CONCLUSION**

7 For all the foregoing reasons, and for the reasons set out in plaintiff M.D. and Rachel
8 David's Opposition to Defendant's Motion for Summary Judgment, in which plaintiff joins,
9 genuine issues of material fact exist as to the liability of all defendants. Plaintiff Jennifer Samson
10 David respectfully requests that defendants' Motions be denied.

11

12 Dated: May 18, 2006

LAW OFFICES OF MICHAEL S. SORGAN

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/s/

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By: _____
15 Joshua Sondheimer
Attorneys for Plaintiff

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